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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LESLIE N. JONES,
Box 98
Flora, Illinois

F. S. FEIGER,
JOHN C. ROBISON,
GERALD T. QUINDRY,
115 N. E. Third
Fairfield, Illinois

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.....

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Respondent*.

To the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner, J. W. SPENCE, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 18, 1966, reversing a District Court judgment which held that Respondent had violated its duty to furnish reasonable transportation to petitioner and ordering it to furnish adequate facilities to discharge such obligation.

OPINION BELOW

The opinion of the Court of Appeals is unreported at the time this petition is being prepared but appears in the record accompanying this petition and appears in Appendix A hereof. The findings of facts, conclusions of law and order of the District Court are not reported, but appear at Pages 40 to 46, of the record hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1966, and appears in Appendix B hereof. Petition for rehearing was denied on June 15, 1966, by order shown in Appendix C hereof. Jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

QUESTION PRESENTED

Where a railroad fails to furnish reasonable railroad transportation may the person entitled to such transportation enforce his right thereto in the Federal Courts?

STATUTES INVOLVED

Chapter 49, Sec. 1 (4), U. S. Code, imposes a burden on carriers to furnish transportation upon reasonable request therefor, (Appendix D). This is a codification of the common law right to service. The question here is whether the Interstate Commerce Act limits the right of a shipper to secure that service by common law action in the Federal Courts. Even if limited entirely to action under the Interstate Commerce Act the jurisdiction of the Court is specifically preserved by the Act. Chapter 49, U. S. Code Section 23, (Appendix E).

JURISDICTION OF DISTRICT COURT

The jurisdiction of the District Court was based on diversity of citizenship and because the case arose under the laws of the United States. Title 49, U.S.C.A. The amount involved exceeds $10,000.00. (R 43).

STATEMENT

The record demonstrates a critical situation. Petitioner here has owned a grain elevator located along the railroad of Respondent for 15 years (R 57). During that entire time, Respondent's railroad service has been worsening (R 57). This is caused by failure of Respondent over a long period of time to replace such a large number of its worn out cars that it now is unable to transport the crops of the territory within a reasonable time (R 74-75). Respondent regularly and constantly fails to comply with Petitioner's reasonable demands for transportation (R 58). Because of this poor, delayed and deteriorating railroad service, Petitioner

has been unable fully to employ his elevator for the purchase and sale of grain (R 56), and those products he has bought and stored are subjected to damage, deterioration and destruction because of the delay in transportation (R 55). Plaintiff has invested approximately $200,000.00 in his elevator, but as a result of his inability to secure adequate railroad service, it is doubtful whether the installation has any present value (R 57). This situation is not one peculiar to Petitioner but is a part of a nation wide car shortage threatening the health, efficiency and economy of the agricultural area of the Midwest.

In the proceedings below, the Court was aided by a brief filed by the Interstate Commerce Commission as amicus curiae. The Commission disclosed it has been investigating this situation since 1954, but nothing has been accomplished because it lacked authority from the Congress to act.

Since the decision of the Circuit Court in this case, Congress has authorized the Interstate Commerce Commission to provide for a payment to be made to the owner of a car in the possession of another carrier, of an amount sufficient to make it economical for the railroads to build their own cars rather than hold and use the cars of other carriers. (Public Law 89-430; 80 Stat. 168). This is looked upon by the Congress as an incentive to the railroads to build their own cars. The act gave to the Interstate Commerce Commission no authority to order such cars be acquired but only to encourage purchase by the size of the charge which it orders for use of another carrier's car.

The District Court held that the facts in this case vested the Federal Courts with jurisdiction to require the offending railroad to furnish adequate transportation to petitioner even if it were necessary to acquire additional facilities to do so. The Court of Appeals reversed this decision and held that the furnishing of adequate transportation was a matter for the Interstate Commerce Commission and not the Courts'.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals that the Federal Court has no authority or jurisdiction to require railroads to furnish adequate transportation is directly contrary and in conflict with the decision of this Court in *U. S. vs. Pennsylvania RR* 242 *U. S.*, 208. This Court there specifically held that the Courts, and not the Commission, have jurisdiction to compel carriers to acquire the additional facilities necessary for it to furnish adequate transportation. This Court set aside, in that case, an order of the Interstate Commerce Commission requiring the acquisition by the defendant railroad of certain tank cars, because the matter was not within the jurisdiction of the Commission but was in the jurisdiction of the Federal Courts. This is the precise question involved here, but the Court of Appeals did not even consider this opinion but stated the law to be directly contrary to the holding of this Court.

2. There is a conflict amongst the Circuits as to the applicable law.

The Eighth Circuit in *Chicago, Rock Island and Pacific Railroad Co., vs. Lawton Refining Co.*, 253, *Fed.* 705, followed the opinion of this Court in *U. S. vs. Pennsylvania Railroad Co., supra,* saying:

> "it was then held that if any duty to furnish such cars exists, it is enforceable in the courts, not by the commission. For a carrier's refusal to accept proper shipments, or to supply reasonable adequate facilities of carriage, the shipper has a remedy by action."

However, the Sixth Circuit, in *L. & N. Railroad vs. Cory*, 54, *Fed.*, 8, and the Seventh Circuit Court in the instant case (Appendix A) have held to the contrary.

The division between the Circuits is wide and should be reconciled in such as an important matter as this.

3. The matters herein involved are of tremendous importance to the agricultural sections of the Midwest. The refusal of Respondent to acquire the facilities necessary to transport the grain from the farm lands in its territory in a reasonably expeditious manner is adding a great burden on the entire economy and well being of the agricultural segment of the country. It is a source of constant trouble to farmers, grain dealers, and allied occupations and industries. The Interstate Commerce Commission has not in the past, and has not now, any direct authority to cure the situation. The most it can do under its recent congressional authority is to impose a rental charge so large that it should encourage railroads to build their own cars. Such authority has not yet been exercised by the commission, and while we assume it will use the authority to the best interest of all, at the most its action can only encourage the acquisition of necessary facilities of transportation to the farm communities but cannot firmly and finally require the adequacy of transportation which is the legal right of Petitioner and others like him. If the Courts do not intervene Petitioner and many like him, farmers and those businesses with whom they deal, will be greatly damaged, and some will be destroyed.

Respectfully submitted.

LESLIE N. JONES
Box 98
Flora, Illinois

F. S. FEIGER,
Box 279
Fairfield, Illinois

JOHN C. ROBISON
Box 279
Fairfield, Illinois

GERALD T. QUINDRY,
Box 279
Fairfield, Illinois

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

No. 15489

J. W. SPENCE, doing business as GEFF SEED AND GRAIN CO., *Plaintiff-Appellee*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *Defendant-Appellant*.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

MAY 18, 1966

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

KNOCH, *Circuit Judge*. This appeal has been taken from temporary restraining order and temporary injunction order of the United States District Court directing the defendant, The Baltimore & Ohio Railroad Company, to provide the plaintiff, J. W. Spence, doing business as Geff Seed and Grain Co., with sufficient, but not less than eight, boxcars daily for hauling soybeans from plaintiff's elevator at Geff, Illinois.

In his complaint, the plaintiff alleged that the defendant was discriminating against the plaintiff in failing to provide plaintiff with sufficient cars for timely removal of the perishable grains in plaintiff's elevator to the plaintiff's irreparable loss through deterioration of over-long stored produce, inability to meet custom-

ary delivery dates, or to accept new grain offered for storage by plaintiff's customers.

The temporary restraining order was issued October 13, 1965, without notice or hearing. On October 18, 1965, the defendant moved to dissolve the temporary restraining order for want of jurisdiction in the U. S. District Court. A hearing was held at which evidence was adduced that plaintiff's elevator bins were filled to capacity, so that he had to refuse tenders of additional produce for storage; that the stored soybeans would lose value unless removed; that plaintiff's elevator has been receiving steadily poorer service from defendant over the past fifteen years primarily because of failure by defendant to replace worn out cars, about 1000 damaged or otherwise obsolete boxcars having accumulated unrepaired over the years at Flora, Illinois, with about 600 junked in this territory in the past few years; that the elevator in which plaintiff has invested about $200,000 is now of doubtful value; that the defendant does not have enough cars to meet the demands of the plaintiff and those of the other 53 elevators located on the lines of the defendant railroad between Cincinnati, Ohio, St. Louis, Missouri, Beardstown, Illinois, and Shawneetown, Illinois.

The District Judge found that:

> 5. Defendant's failure and refusal to furnish said cars for loading and transportation results from the failure and refusal of defendant to repair the cars belonging to it available and appropriate for the purpose of transportation of said soybeans; the cars belonging to defendant available and appropriate for such purpose have deteriorated to the point where they are no longer appropriate for the purpose of defendant; and defendant has failed and refused, and continues to fail and refuse to either: (a) repair said cars and make them appropriate for said purpose, or (b) to acquire other cars for that purpose.

* * * * *

8. Defendant's testimony in open court discloses that in the territory here involved (*i.e.*, the St. Louis Division of said defendant), approximately 1,000 boxcars appropriate for the purpose herein described, have deterioated to the extent that they are no longer usable for such purposes. It further shows that defendant has neither made any repairs to said cars to render them usable, nor has it acquired other appropriate cars in lieu thereof. Such testimony discloses no plan or program of the defendant either to repair said cars or to acquire others. As a consequence, the ability of defendant to discharge its obligation to furnish adequate transportation is critically impaired, and will continue further to decline.

The District Court concluded that:

3. It is the duty of defendant to provide safe and adequate transportation to plaintiff upon reasonable notice, and defendant is not excused from that obligation by failing and refusing to repair its cars appropriate thereto, or failing and refusing to acquire and furnish other cars in lieu thereof.

4. Plaintiff, as a matter of law, is entitled to the Preliminary Injunction prayed for under the facts alleged to in the verified Complaint, the verified Motion for Preliminary Injunction, and testimony heard in open court.

An Order for Preliminary Injunction issued November 1, 1965, directing defendant as follows:

That you forthwith furnish Plaintiff with sufficient boxcars, at his Elevator at Geff, Illinois, of a type to properly haul soy beans and protect same against rain and inclement weather, to remove all soy beans now located in Plaintiff's Elevator at Geff, Illinois, together with all soy beans purchased by him in due course of business and offered for shipment while the soy beans in the Elevator are being removed,

said boxcars to be furnished at the rate of not less than eight (8) daily; unless a lesser number is requested by Plaintiff, and to remove the filled cars the next time Defendant's train makes a trip past Plaintiff's Elevator and not later than the following day and to replace the filled cars on Plaintiff's railroad siding with empty cars. That you instanter cease failing and refusing to furnish Plaintiff a sufficient amount of boxcars of a type proper to haul soy beans and protect same against rain and inclement weather, to remove all soy beans now located in his Elevator at Geff, Illinois, together with all soy beans purchased by him in due course of business and offered for shipment while the soy beans in the Elevator are being removed, and to cease instanter to fail, refuse and neglect to furnish Plaintiff at his Elevator at Geff, Illinois, said boxcars at the rate of not less than eight (8) daily, unless a lesser number is requested by Plaintiff, and to remove the filled cars the next time Defendant's train makes a trip past

---

[1] **§ 28. Mandamus to obtain equal facilities for shippers**

The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of this chapter and chapters 8, 12, and 13 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: **Provided,** That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: **Provided,** That the remedy given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this chapter and chapters 8, 12, and 13 of this title.

[2] § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulatng commerce or protecting trade and commerce against restraints and monopolies.

Plaintiff's Elevator and not later than the following day and to replace the filled cars on Plaintiff's railroad siding with empty cars, until such time as Plaintiff's said Elevator shall be emptied.

There was no finding of discrimination. Plaintiff asserts in this Court that he is not relying on any discrimination to support his claim to mandatory injunction.

Plaintiff's theory is that he is entiled to railroad service under the provisions of the Interstate Commerce Act, and that jurisdiction to enforce plaintiff's right rests in the U. S. District Court under §23 of that Act (Title 49 U.S.C.)[1] and under Title 28 U.S.C. §1337[2]; that the Interstate Commerce Commission would have original jurisdiction only where the plaintiff sought to secure a preference over other shippers or to cure discrimination against him.

The Interstate Commerce Commission was not a party to the proceedings in the District Court. The Orders there were entered without prior reference of the matter to the Commission. In this Court, the Commission has filed a brief as Amicus Curiae.

Plaintiff contends that it was proper for him to secure relief in the U. S. District Court because he is not asking that Court to fix the method whereby the defendant shall acquire the facilities to provide the service ordered, that such means may well be a matter exclusively for the Interstate Commerce Commission and the defendant railroad, but that it was within the jurisdiction of the District Court to order the end result; that defendant is entitled to a reasonable period of time to secure such equipment as it may now lack to provide the directed service to plaintiff and that for such limited reasonable time, the defendant is purged of contempt of the District Court's Orders.

As the Interstate Commerce Commission does not now assert the authority to direct a railroad to acquire more boxcars, plain-

tiff feels that the United States District Court must be empowered to do just that.

We agree with the Commission that in this case the District Court engaged in an administrative investigation of the available cars in the territory, found that the defendant railroad had a number of obsolete cars on hand and enjoined the defendant railroad for failing to supply the cars requested by one particular shipper, the plaintiff.

Section 23 grants authority to the District Court under certain circumstances to enter orders in the nature of mandamus to compel a carrier to grant as many cars to one shipper as to another similarly situated shipper, but the District Court found no such discrimination here, and plaintiff concedes that such discrimination does not exist here.

Under similar circumstances, in *B. & O. RR. v. U. S. ex rel. Pitcairn Coal Co.*, 1910, 215 U. S. 481, 493, 30 S. Ct. 164, 169, the Supreme Court saw "no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, . . . had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In this case we have an issue to be decided by the Commission: the reasonableness of the defendant's method of car distribution for seasonal loading during a car shortage. The case thus differs from the situations involved in such cases as *Penn. R. Co.* v. *Son-Man Co.*, 1916, 242 U. S. 120, 124, 37 S. Ct. 46, 48, for example, where the parties agreed that the shipper made a reasonable demand and there was an unexplained failure to supply cars in confessedly normal conditions, leaving no administrative question for the Interstate Commerce Commission to solve.

The Orders of the District Court compelling the defendant to furnish the plaintiff with a specified number of cars may create

that very discrimination which the Commission must strive to avoid with the aid of its Bureau of Railroad Safety & Service which acts as a clearing house to ascertain the needs of shippers and the availability of cars by the respective carriers. The car shortage on the B. & O. is a symptom of a national problem now the subject of a full-scale investigation by the Commission.

Currently Service Order 973, 31 F.R. 1303, provides:

> *It appearing,* That in the opinion of the Commission there exists a shortage of equipment, particularly of plain boxcars, in certain sections of the country of such a nature as to create an emergency requiring immediate action; that existing carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of cars to the railroads owning such cars are ineffective; that car service will be promoted in the interest of the public through the issuance of car distribution directions for the location or relocation of empty cars; that notice and public procedure are impractical and contrary to the public interest under the circumstances; and that good cause therefor exists for the entry of this order upon less than 30 days' notice:
>
> *It is ordered,* That:
>
> § 95.973 *APPOINTMENT OF AGENTS*
>
> (a) R.D. Pfahler, Director and H. R. Longhurst, Assistant director, Bureau of Railroad Safety and Service, Interstate Commerce Commission, Washington, D.C., and each of them are hereby appointed Agents of the Interstate Commerce Commission and vested with authority to issue Car Distribution Directions with respect to the location and relocation of empty cars, and to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers by railroads as in their opinion will

best promote the service in the interest of the public and the commerce of the people.

(b) *Rules, Regulations, and Practices Suspended.* The operation of all rules, regulations, and practices insofar as they conflict with the provisions of this order, is hereby suspended.

We conclude that the U.S. District Court lacked jurisdiction to enter the Orders from which appeal has been taken. The Decision of the District Court is accordingly reversed and this cause is remanded to dissolve the temporary restraining order and the temporary injunction heretofore entered herein.

REVERSED AND REMANDED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

WEDNESDAY, MAY 18, 1966

BEFORE

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

J. W. SPENCE, doing business as GEFF SEED AND GRAIN CO., *Plaintiff-Appellee,*

No. 15489 vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this case appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court, to dissolve the temporary restraining order and the temporary injunction heretofore entered herein, in accordance with the opinion of the Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

WEDNESDAY, JUNE 15, 1966

BEFORE

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

J. W. SPENCE, d/b/a GEFF SEED AND GRAIN CO.,
Plaintiff-Appellee,

No. 15489 vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the appellee herein, be, and the same is hereby DENIED.

APPENDIX D

Title 49, Sec. 1 (4) U. S. C. A.

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor . . ."

APPENDIX E

Title 49, Section 23 of U. S. C. A.

"The District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of this chapter and chapters 8, 12 and 13 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the Court, or otherwise, as the Court may think proper, pending the determination of the question of fact; Provided, That the remedy given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this chapter and chapters 8, 12 and 13 of this title."

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J. W. SPENCE, DOING BUSINESS AS GEFF SEED AND GRAIN COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF AMICUS CURIAE BY ILLINOIS AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI.

GEORGE E. MERKER, JR.,
1701 Towanda Avenue,
Bloomington, Illinois 61701,
Attorney for Illinois Agricultural Association.

Of Counsel:
MATHIAS, MERKER & ADLER,
1701 Towanda Avenue,
Bloomington, Illinois 61701.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 534.

J. W. SPENCE, DOING BUSINESS AS GEFF SEED AND GRAIN COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF AMICUS CURIAE BY ILLINOIS AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

CONSENTS.

The Illinois Agricultural Association has received the written consent of both J. W. Spence, doing business as Geff Seed and Grain Company, Petitioner by and through his attorneys, Leslie N. Jones, Francis S. Feiger, John C. Robison and Gerald T. Quindry and of The Baltimore and Ohio Railroad Company, a Corporation, Respondent by and

through its attorneys, Graham and Graham to the filing of this brief Amicus Curiae prior to the consideration by the Court of the Petition for Writ of Certiorari and the same have been filed with the Clerk of this Court.

THE INTEREST OF ILLINOIS AGRICULTURAL ASSOCIATION.

The Illinois Agricultural Association is a not-for-profit general farm membership corporation organized for the purpose of promoting agriculture and the mutual interests of its farmer members therein. It is organized under the laws of the State of Illinois having its principal office at 1701 Towanda Avenue, Bloomington, Illinois 61701 and has as its members 195,000 families resident throughout the State of Illinois who are engaged in some form of farming. Although the Illinois Agricultural Association is not a party to this proceeding, the issues involved herein vitally affect its members. Lack of sufficient railroad cars yearly causes considerable loss to Illinois farmers not only by reducing proceeds from crops for want of timely access to markets but also by deterioration in the product as where the grain has had to lay on the ground because of the impossibility of moving it.

Petitioner is of course vitally concerned in this case because it affects its own business, but we submit that the problem is much broader in its effects and consequences. FS Services, Inc., a farmer cooperative affiliated with the Illinois Agricultural Association is not only a manufacturer and distributor of farm supplies to farmers in Illinois, Iowa and Wisconsin, but has 40 local member companies who are engaged in grain marketing, operating 75 grain elevators. Another Illinois Agricultural Association affiliated farmer cooperative, Illinois Grain Corporation, has additionally some 217 member companies who are engaged

in the cooperative marketing of grain at many locations throughout the State of Illinois.

The Illinois Agricultural Association during the last several years has received numerous requests from these companies and from individual farmers located throughout the State of Illinois urging the Association to take all necessary and proper action to induce the railroads to alleviate railroad car shortages. Complaints to Illinois Agricultural Association from grain companies and individual farmers concerning serious railroad car shortages have not only been leveled against Respondent, but have also included the other railroads operating in the State of Illinois; and have not only involved the inability for lack of cars to transport soybeans, but have also involved the inability to transport many other agricultural supplies and products for the same reason.

In addition to the foregoing, the source of basic products used by the said FS Services, Inc. in its manufacturing plants originates in various parts of the United States and Canada. This company, which manufactures and distributes, among other farm supplies, a great portion of the fertilizer used on the farms of Illinois, Iowa and Wisconsin, like other similar fertilizer companies, has been seriously hampered by the car supply problem. These companies use the same types of equipment as do the grain elevators, thus increasing the existing problem. The member grain companies mentioned heretofore ship many carloads of grain to various destinations throughout the United States. Due to the inability of the rail carrier to furnish adequate amounts of equipment, many shipments have had to be curtailed in previous years and there is apparently no relief possible without the aid of this court.

These facts clearly demonstrate that the problem is truly national in scope.

ARGUMENT.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals Leaves Petitioner and Others Suffering Loss From Car Shortages With No Effective Remedy.

The decision of the Court of Appeals for the Seventh Circuit which appears as *Appendix A* at page 6 *et seq.* in the *Petition for Writ of Certiorari* holds that the Petitioner has no judicial remedy, but that there is an issue for the Interstate Commerce Commission to decide. This issue, it is stated, is the reasonableness of the defendant's method of car distribution for seasonal loading during a temporary car shortage. The Interstate Commerce Commission in its brief Amicus Curiae filed with the Court of Appeals in the case, Page 9 *et seq.*, however, indicated that it had no authority under the Interstate Commerce Act to grant any effective remedy so far as requiring the railroads to have available adequate amounts of equipment. We thus have the impossible situation that the issue raised here cannot be answered by the Commerce Commission for it can only decide that the Petitioner is entitled to more existing cars, or that he is not entitled to more existing cars. The only issue on a further appeal would be the reasonableness and propriety of that order. The question here raised, as to whether or not the railroad has a responsibility to furnish reasonable transportation to the Petitioner and the others by having available an adequate number of suitable cars to reasonably meet the demands of all shippers, and whether this duty can be enforced in a court of law, will not be determined.

2. The Court of Appeals Has Erroneously Applied the Law as Determined by This Court.

The case cited by the Court of Appeals to support its conclusion is *Baltimore & O. R. R.* v. *United States ex rel. Pitcairn Coal Co.* (1910), 215 U. S. 481, 493, 30 S. Ct. 164, 169. This is an earlier case than the case of *Penn. Railroad Co.* v. *Sonman Shaft Coal Co.* (1916), 242 U. S. 120, 124, 37 S. Ct. 46, 48 cited by this court and is distinguishable. A major element in *Pitcairn Coal, supra,* was preferential treatment of certain shippers. This was a prime reason for requiring the parties to first proceed before the Interstate Commerce Commission. In the instant proceeding, however, no discrimination has been raised as an issue.

The Court of Appeals also failed to apply the true distinction between a Commission matter and a matter for the courts as enunciated by this Court in the *Sonman* case *supra* (242 U. S. page 127). There the conditions in the coal trade were normal and the demand for cars was reasonable. There was no unusual or abnormal condition *not reasonably to have been foreseen* by the railroad such as an extraordinary volume of coal traffic or an unusual detention of cars on other lines of the railroad. There must be an element of the unforeseen to constitute an emergency car shortage requiring Commission action and not a condition caused by long term neglect on the part of the railroad as complained of in the current proceeding. This is consistent with the earlier holdings of this court. *Pennsylvania R. Co.* v. *Puritan Coal Min. Co.* (1914), 237 U. S. 121, 133, 35 S. Ct. 484.

In the case now before the court we have a situation which has steadily worsened over a period of 15 years because of the failure of the railroads over a long period of time to replace such a large number of its worn out cars that the railroads are now unable to transport the crops of the territory in question within a reasonable time.

3. The Passage of Public Law 89-430, 80 Stat. 168 Shows the Congressional Intent That This Petitioner and Others Suffering From a Car Shortage Retain Their Rights to Judicial Remedy.

The controlling decision of this court in *U. S.* v. *Penn. Railroad Co.* (1916), 242 U. S. 208, 37 S. Ct. 95, held that the Courts, not the Interstate Commerce Commission, had jurisdiction to compel carriers to acquire adequate facilities for transportation. The Commission in its brief Amicus Curiae *supra* likewise admitted it had no such powers. Likewise, *Public Law 89-430;* 80 Stat. 168 effective September 1, 1966, gave the Commission no authority to order the railroads to acquire cars but only gave the Commission authority to encourage the carriers to acquire more equipment by the indirect means of heavy charges for use of another carrier's car. Since Congress must be presumed to have known the prior holdings of this Court and the consistent administrative practices in connection therewith, and still did not give the Commission the authority to order the acquisition of equipment, the power to require the railroads to provide and furnish transportation upon reasonable request therefor under *United States Code Annotated,* Chapter 49, Sec. 1 (4) must remain where this court and Congress by Sec. 23 of such chapter left it, that is, in the courts. (For quotation of the terms of these acts see Appendices D and E, pages 15 and 16 of the Petition for Writ of Certiorari.)

CONCLUSION.

Therefore, the Illinois Agricultural Association through its attorney George E. Merker, Jr. prays that a Writ of Certiorari as sought by the Petitioner be issued in this cause.

Respectfully submitted,

GEORGE E. MERKER, JR.,
1701 Towanda Avenue,
Bloomington, Illinois 61701,
Attorney for Illinois Agricultural Association.

Of Counsel:
MATHIAS, MERKER & ADLER,
1701 Towanda Avenue,
Bloomington, Illinois 61701.

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 534

J. W. SPENCE, doing business as Geff Seed and Grain Company,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation,
Respondent.

To the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH J. GRAHAM, Jr.
HUGH J. GRAHAM, III
GRAHAM & GRAHAM
1201 South Eighth Street
Springfield, Illinois
Attorneys for Respondent

SCHNEPP & BARNES, PRINTERS, INC., SPRINGFIELD, ILL.

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Reasons For Denying Writ Of Certiorari

The respondent herein submits that considerations regarding the granting of a Writ of Certiorari are not present in the instant matter for the following reasons:

1. Petitioner states that the opinion of the United States Court of Appeals, Seventh Circuit, in the instant matter is directly contrary to the opinion and holding in *U.S. v. Pennsylvania Railroad*, 242 U.S. 208 (1916).

The court, in *U.S. v. Pennsylvania Railroad,* 242 U.S. 208 (1916), was faced with the question of whether or not the Interstate Commerce Commission, by virtue of the 1906 amendments to the Interstate Commerce Act, had authority to require a carrier to acquire tank cars for use by a shipper. This question was presented to the United States District Court, following the issuance of an order by the Interstate Commerce Commission requiring carriers to build or purchase new tank cars by the Pennsylvania Railroad, and the railroad obtained an injunction enjoining the enforcement of that order in the United States District Court. On appeal, the United States Supreme Court held that the Interstate Commerce Commission had no authority to issue such an order.

The position of petitioner, that the case of *U.S. v. Pennsylvania Railroad,* 242 U.S. 208 (1916) stands for the proposition that courts, as a matter of initial resort, have jurisdiction to issue mandatory orders for acquisition of new equipment is not the holding of that *U.S. v. Pennsylvania Railroad* case. Rather, the court in that case did hold that in view of the existing legislation, the Interstate Commerce Commission had no authority to make such an affirmative order; that court, however, makes no resolution of the question whether or not a court had this authority under the then existing law.

2. Petitioner cites *Chicago, Rock Island & Pacific Railroad Co. v. Lawton Refining Co.,* 253 Fed. 705 and *Louisville & Nashville Railroad Co. v. Cory,* 54 Fed. 2d 8 (CCA 6, 1936) as evidence of a conflict in the circuits as to the resolution of the instant matter. Inasmuch as petitioner concedes that United States Court of Appeals, Seventh Circuit, in the immediate matter, is in agreement with *Louisville & Nashville Railroad Co. v. Cory,* 54 Fed. 2d 8 (CCA 6, 1931) this will not be discussed at this point.

Chicago, Rock Island & Pacific Railroad Co. v. Lawton Refining Co., 253 Fed. 705, is not analogous factually and the following excerpt from the opinion in the *Lawton Case* should be dispositive of the claim that there is a conflict in view of the *Lawton Case*. The excerpt, found at page 706, is as follows:

> "It is to be observed that the injunction is limited to the use of cars in intrastate traffic, and that there was no evidence of the effect upon interstate commerce that would result from the enforcement of the order. There was no evidence to show that any other shippers desired that the railway company should furnish them with such cars. Questions of dissemination are therefore not presented by this record, nor are there any questions arising under the acts of Congress regulating interstate commerce; but the case is to be determined by the laws in force in Oklahoma relating to intrastate shipments."

For the above reasons then, it is submitted that none of the elements are present which would compel this court to grant a writ of certiorari in the instant matter.

STATUTES AND REGULATIONS APPLICABLE

Petitioner asserts that the United States District Court jurisdiction is grounded in Sec. 23, Title 49, U.S.C.A., and in Sec. 1(4) of the same chapter. No mention was made by petitioner in his brief of Sections 1(15) and 1(16) of Title 49, U.S.C.A. [Appendices A & B hereof], which empower the Interstate Commerce Commission, during periods of declared car shortages, to make just and reasonable rules with regard to car service.

Interstate Commerce Commission Car Service Orders, Nos. 947 and 968, effective October 1, 1965 and October 4, 1965, respectively, [Appendices C & D hereof], are orders, indicating that a serious car shortage does exist nationally at the time this case was presented in the United States District Court, Southern District of Illinois, Southern Division, and some of the remedies the Interstate Commerce Commission has taken to alleviate this condition. Moreover, not only is the Interstate Commerce Commission aware of an existing car shortage but so also is the United States Congress as indicated by Public Law 89-430; 80 Stat. 168, being an amendment to Sec. 1(14) Title 49, U.S.C.A., which amendment is found as Appendix E hereof.

QUESTION FOR REVIEW

The question for review by this court is as follows:

Does a United States District Court have jurisdiction during a period of declared car shortage, to issue a temporary injunction ordering a carrier to furnish, daily, a given number of box cars for grain shipment, to a specific shipper?

STATEMENT OF THE CASE

The statement of the case of petitioner should be supplemented with the following facts:

The petitioner, J. W. Spence, doing business as Geff Seed and Grain Co., sought and obtained, without notice or hearing, a temporary restraining order in the United States District Court, Southern District of Illinois, Southern Division, compelling respondent, The Baltimore and Ohio Railroad Company, to furnish sufficient box cars, not less than eight cars a day, to remove soy beans from petitioner's elevator at Geff, Illinois, to prevent heat loss to the contents. [App. pp. 18-20].

The complaint states that respondent carrier had discriminated against it in favor of shippers in Springfield, East St. Louis and other points in Illinois, by violation of the statutes of the State of Illinois, towit: Chapter 114, Secs. 111, 112 and 116, in effect, by failing to deliver sufficient cars. [App. pp. 3-5, 10]

Harold W. Hartmann, car distributor for the Baltimore and Ohio Railroad testified that his area encompassed the southern portions of the States of Illinois, Indiana and Ohio. [Rec. 48-54; App. 65-67.] He also testified that he had insufficient cars to satisfy all demands of shippers in his area. [Rec. 63, App. 72.]

There was no finding by the Federal District Court, Southern District of Illinois, Southern Division, of any discrimination in the instant matter.

The petitioner did not seek redress from the Interstate Commerce Commission.

ARGUMENT

I.

The Interstate Commerce Commission has primary jurisdiction over affirmative duties of carriers with regard to complaints charging discrimination and allocation of box car equipment for interstate shipment.

The original complaint filed by petitioner, J. W. Spence, doing business as Geff Seed and Grain Company, charges that this respondent, The Baltimore and Ohio Railroad Company, discriminated against petitioner by failing to deliver sufficient cars to petitioner (App. 3-5, 10). As was noted in the opinion of the United States Court of Appeals, Seventh Circuit, there was no proof of discrimination as charged by petitioner.

That United States Court of Appeals, Seventh Circuit, in its opinion, did find, however, that there is presently an emergency shortage of box car equipment needed to handle the requests of various shippers.

More importantly, that court held that in view of the existing car shortage, the legislation and regulations presently applicable, a United States District Court is without jurisdiction to issue a mandatory order requiring delivery of a given number of box cars to a particular shipper. It would seem, in all fairness, the conclusion of that court that entry of such an order may very well result in discrimination is more than a reasonable one.

There have been a number of United States Supreme Court and United States Court of Appeals holdings dealing with this general problem of jurisdiction regarding the allocation of car equipment.

One of the earlier cases dealing with the question of allocation of equipment is *The Baltimore & Ohio Railroad Co. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910) and cited with approval by the United States Court of Appeals, Seventh Circuit, in the insant matter. In that case (*Baltimore & Ohio Railroad Co. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 [1910]), a coal mining company filed its petition in mandamus in the United States District Court of Maryland asserting that it was entitled to an equal distribution of coal cars during car shortages. The car allocation formulas of the Baltimore and Ohio Railroad Company were at issue and the district court, after resolution of most of the issues against the petitioner, awarded the writ on the issue of whether private cars should be counted in computing car allocation percentages in times of car shortages. The United States Supreme Court, after interim appeal to the Circuit Court of Appeals, remanded the case to the district court, dismissing the petition and stated, at pages 492 and 493 of its opinion:

> "One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, *even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts*, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come. (Emphasis ours.)
>
> "To a consideration of this question it is essential

> to at once summarily and accurately fix the subject matter of the alleged grievance and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of The Baltimore and Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

The Court of Appeals in the instant matter noted that the resolution of the issue of a proper allocation of car equipment during a period of shortage was one requiring the administrative ex pertise of the Interstate Commerce Commission just as was noted in the case of *Baltimore & Ohio Railroad v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910).

The case of *U.S. v. Pennsylvania Railroad Co.*, 242 U.S. 208, has previously been noted by respondent in this brief in its suggestion to this court that a writ of certiorari is inapplicable in the instant matter.

As was noted earlier, *U.S. v. Pennsylvania Railroad*, 242 U.S. 208, should properly stand for no more than the proposition that the Interstate Commerce Commission, by virtue of legislation effective through 1906, did not have authority to order a carrier to acquire tank car equipment.

A later case, *Corona Coal Co. v. Southern Rwy. Co.*, 266 Fed. 726 (1920), affd. 260 U.S. 698, is most similar factually to the instant matter. The question before the federal district court, upon removal from a state court, was the propriety of the issuance of a temporary injunction without notice or hearing against a carrier in time of dire coal car shortage challenging an allocation rule of a carrier. That court of appeals held, at pages 733 and 734, that it was without jurisdiction, saying:

> "On consideration of paragraph 12 and the other provisions of the Transportation Act, and the purpose for which the Interstate Commerce Commission was created and clothed with authority, I am constrained to believe that plaintiff has presented a case for administrative intervention, and not one calling for the exercise of a judicial function.
>
> "Moreover, for the courts to assume jurisdiction over cases like the one presented by the plaintiff would be a suggestion that the courts be invited to interfere in all similar controversies between mines and railroads. This would force the courts to go very largely into the business of railroad and mine administration, and thereby, to the extent of such interference, would be imposed insuperable work of mere direction and management and not of a judicial character. The courts are not fitted for such duties, but the Interstate Com-

merce Commission is especially and well designed for that field of usefulness."

The court further stated in that *Coronal Coal Company* case [266 F. 726 (1920) affirmed 260 U.S. 698], at page 735:

> "The court is mindful of the fact that the continuation of the injunction pending the suggested appeal would be calculated to encourage other mine operators in a situation similar to that occupied by the plaintiff, to seek redress in the state court as that sought there by the plaintiff. Such a course would tend to render nugatory the rules of car distribution established by the defendant under the sanction of the Interstate Commerce Commission and in conflict with the action of this court.
>
> "That the shortage of cars adversely affects the coal-mining company is fully understood, and that the interests of the plaintiff may to a greater or less extent be injured by the refusal of the court to keep in force the injunction, is appreciated. But the answer to this suggestion is that, under the view of the case which the court has taken, the plaintiff can apply for, and doubtless receive, immediate redress from the Interstate Commerce Commission, which, as the court has held, has jurisdiction of the subject matter of the plaintiff's complaint, and is designed and equipped to grant relief upon proper showing being made."

It must be remembered that the instant matter came to the federal district court upon a charge of discrimination although no proof was made on such point. Additionally, Sec. 23 of Title 49, U.S.C.A., by its own terms is inapplicable where there is proof of discrimination. Consequently, it is submitted that Sec. 23, Title 49, U.S.C.A., is not properly a part of this instant matter.

Apart from failure of petitioner, in the instant matter, to prove any discrimination, *Baltimore & Ohio Railroad Co. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910),

is identical to the instant matter. Moreover, in *Corona Coal Co. v. Southern Rwy. Co.*, 266 Fed. 726 (1920) affd. 260 U.S. 698, where there was no question of discrimination (and therefore identical in principle with this situation) that court found the federal district court was without jurisdiction.

The most cogent summary of the proper focus for resolution of this case at hand is found in *Louisville & Nashville Railroad Co. v. Cory*, 54 Fed. 2d 8 (CCA 6, 1931). That case did not have involved the question of discrimination; the sole issue was whether or not a carrier had maintained a sufficient fleet of cars to properly service its customers. In an action for money damages the shipper was successful in trial court but was reversed by the United States Court of Appeals, Sixth Circuit, on the principle that the reasonable adequacy of car supply presents an issue for administrative determination by the Interstate Commerce Commission before resorting for aid to the judiciary. The language of that opinion is found at page 10 as follows:

> "The claim of the plaintiff is, not that he did not receive his proper share of the cars available for distribution, but that the defendant was not possessed of such an adequate supply of coal cars as was reasonably necessary to serve the mines upon its road during normal times, and, had it been so equipped, the number of cars furnished plaintiff would have been proportionately increased. Fundamentally, therefore, the duty of defendant which plaintiff alleges was breached was the duty to provide itself with reasonably adequate facilities to perform its professed public service, and not the duty to serve all who applied without discrimination, for it is conceded that this latter duty was performed in so far as the defendant was able to perform it with the equipment at hand. The former, we think, presented an administrative question for the

initial determination of the Interstate Commerce Commission. . . .

"The *reasonable adequacy of car supply* presents a question which is indistinguishable in its legal aspects from a question of the character of equipment which the carrier must provide (*Loomis v. Lehigh Valley Railroad Co.*, 240 U.S. 43, 36 S. Ct. 228, 60 L. Ed. 517); from one of the reasonableness of a rule by which open-top cars were supplied to tipple mines and box cars to wagon mines (*Midland Valley Railroad Co. v. Barkley*, 276 U.S. 482, 48 S. Ct. 342, 72 L. Ed. 664); from one where the attack is upon the reasonableness of a rule, or the method of car distribution practiced by the carrier (*Pennsylvania Railroad Co. v. Clark Bros. Coal Mining Co.*, 238 U.S. 456, 35 S. Ct. 896, 59 L. Ed. 1406; *Morrisdale Coal Co. v. Pennsylvania Railroad Co.*, 230 U.S. 304, 33 S. Ct. 938, 57 L. Ed. 1494); . . . In all the cases just sited it was held that initial resort must be had to the Commission. In all it was recognized that the inquiry was one of fact and the exercise of reasonable discretion in technical matters; and that a determination could be reached only upon a consideration of a mass of fact evidence, a proper appreciation of the rights and obligations of both carrier and shipper and the practical limitations upon the service reasonably to be required, and an intimate acquaintance with the innumerable problems of transportation. All of these questions relate to regulation in its legislative sense and demand the attention of experts. The rule is well stated in *Great Northern Rwy. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291, 42 S. Ct. 477, 66 L. Ed. 943, and should, we think, be here applied." (Emphasis ours)

The above cases have been cited for the proposition that during a period of declared car shortage, the courts, when presented with problems similar to the instant matter, have been compelled to find, that in view of the legislation applicable at the time the various case arose for determin-

ation, the courts had no jurisdiction to intervene on behalf of a shipper.

The conclusion which these courts have reached has been that the Interstate Commerce Commission has the administrative ex pertise to deal with these situations. This, it is submitted, is properly so since that Interstate Commerce Commission has available, reports showing, for example, movement of car supply, nature of shipment runs of the various carriers, needs of particular shippers and carriers unique to a given area, and that they alone have this knowledge to resolve these issues; and in fact for the courts to intervene would be to create myriad problems attendant upon the transportation industry.

The United States Congress, subsequent to these three cases, *Baltimore & Ohio Railroad Co. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910); *Corona Coal Co. v. Southern Rwy. Co.*, 266 Fed. 726 (1910) affd. 260 U.S. 698; and *U.S. v. Pennsylvania Railroad*, 242 U.S. 208 (1916), adopted the Esch Car Service Act, now codified at Sec. 1(10) et seq., Title 49, U.S.C.A., heretofore referred to in Appendices A & B.

II.

The Interstate Commerce Commission by promulgation of emergency orders in times of car shortage has exclusive jurisdiction over issuance of mandatory orders against carriers concerning allocation of equipment involved in interstate commerce.

Previously, the scope of inquiry has been related to the judicial development of guide lines regarding the jurisdiction of a United States District Court to issue an injunction to order a carrier to make available car equipment to a shipper in times of dire car shortage.

In addition, as indicated, there has been congressional activity relating to this very problem. The Esch Car Service Act of 1917 [being Secs. 1-10 et seq. and more particularly Secs. 1(15) and 1(16), Title 49, U.S.C.A., Appendices A & B hereof] are directly applicable in the instant matter. This Act was passed at a time when there was a national shortage of car equipment needed to service the coal industry. By virtue of Sec. 1(15) [Appendix A], the Interstate Commerce Commission in times of emergency may order a carrier, without notice or hearing, *without any finding of discrimination,* to suspend its own rules regarding allocation of equipment and to adopt the Commission rules regarding such allocation. The Interstate Commerce Commission, by virtue of Car Service Orders Nos. 947 and 968 [Appendices C & D hereof], have in fact found that such car emergency shortage does exist and has promulgated its own rules regarding car service.

These particular orders, Nos. 947 and 968, [Appendices C & D] were issued just thirteen days before the United States District entered the temporary restraining order in this matter. Such car service orders have the effect of law, [*U. S. v. Michigan Portland Cement Co.*, 270 U.S. 521, 525] and by their own terms apply to intra and inter state shipments. [*Chicago, Minneapolis, St. Paul, & Pacific Railroad Co. v. McCree & Co.*, 91 Fed. Supp. 57, 61]. These emergency car service orders were issued by the Interstate Commerce Commission pursuant to authority granted in the Esch Car Service Act of 1917.

Thus, it is apparent, not only that the Interstate Commerce Commission is cognizant of a car shortage presently, but also has taken steps to alleviate this shortage.

By virtue of the Esch Car Service Act of 1917 and the emergency orders issued by the Interstate Commerce Commission in October, 1965, and the information it has generally concerning railroad movement it must be seen that the only logical repository of power for issuance of mandatory orders against carriers lies with the Interstate Commerce Commission. Only the Interstate Commerce Commission has the necessary information ex pertise to administer a nationwide program during times of dire car shortages.

Stated otherwise, by virtue of that legislation and the action of the Interstate Commerce Commission thereunder, the Interstate Commerce Commission has preempted the field of regulation of railroad box car equipment.

The Interstate Commerce Commission has the information at hand of the varying needs and abilities of the interstate carriers and the requirements of the shippers in their particular areas.

The Commission can order a particular carrier to make whatever adjustments with regard to the routing, movement and distribution of cars for the benefit of another railroad as it deems necessary in view of the needs of interstate commerce, [Title 49, U.S.C.A., Sec. 1(16)]. For example, the Commission, on a finding of an emergency, can order the Lehigh Valley Railroad to furnish specific box cars to the Illinois Central Railroad to alleviate a shortage of box cars of the latter, unique to a particular locale, [Sec. 1(15), Title 49, U.S.C.A.].

Moreover, the amicus curiae brief of the Interstate Com-

merce Commission submitted to the Seventh District Court of Appeals, in this matter well illustrates the alertness and involvement of the Commission in the total situation and the other administrative remedies it holds available to the shipper.

There is, therefore, no reason to set out these additional powers in detail except to state generally that upon a proper showing to the Commission, the Commission would have every right, without notice or hearing, to rearrange allocation rules of The Baltimore and Ohio Railroad Company, in the area of Geff, Illinois or if it saw fit to order neighboring carriers to make available specific types of equipment to the respondent for benefit of petitioner and shippers similarly situated.

And, finally, the United States Congress is presently aware of the shortage regarding box car equipment in the rail transportation industry as is indicated by the passage of Public Law 89-430; 80 Stat. 168. This act was approved May 26, 1966, and is Appendix E hereof. The tenor of this act is to make greater inducements to the railroad industry to acquire or build freight car equipment. In substance, the end result desired is the present increase among the carriers of freight car equipment to end a car shortage.

In conclusion, it is submitted that interstate transportation by rail is of national scope.

The Congress is aware of this fact; the Interstate Commerce Commission is aware of this fact. The judiciary is aware of this fact.

Each has acted at various times in its own way to alleviate the difficulty of a national car shortage.

For example, by regulations issued presently under earlier statutes, the Interstate Commerce Commission has acted to alleviate this car shortage. The Congress, in May of this year, has acted again to alleviate this car shortage.

Because the situation is of national scope and because of the action by the Interstate Commerce Commission and the United States Congress, it must reasonably be concluded that the Interstate Commerce Commission has preempted the field of car equipment allocation in times of car shortage.

And, accordingly, a United States District Court is without jurisdiction to enter a temporary injunction requiring an interstate carrier, during times of dire car shortage, to deliver daily a given number of box cars to a particular shipper.

CONCLUSION

In view of the above, it is respectfully prayed of this court that this court deny the petition for writ of certiorari of petitioner, J. W. Spence, doing business as Geff Seed and Grain Company, in the instant matter.

Respectfully submitted,

HUGH J. GRAHAM, Jr.
HUGH J. GRAHAM, III
GRAHAM & GRAHAM
1201 South Eighth Street
Springfield, Illinois
Attorneys for Respondent

APPENDIX A

"(15) *Powers of Commission in case of emergency.* — Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carrier as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of

traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Sec. 1(15), Title 49, U.S.C.A.

APPENDIX B

"(16) *Rerouting of traffic on failure of initial carrier to serve public.* — Whenever the Commission is of opinion that any carrier by railroad subject to this part (Secs. 1-5, 5b-15a, 16, 17-23, 26, 27 of this title) is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

Sec. 1(16), Title 49, U.S.C.A.

APPENDIX C

ASSOCIATION OF AMERICAN RAILROADS
Operations and Maintenance Department
Car Service Division
Transportation Building 1203
Washington, D.C. 20006

R. R. Manion
Vice President
Operations and Maintenance Dept.

E. P. Miller, Chairman
B. W. Taylor, Executive Assistant
D. W. Benton, Assistant to Chairman—Refrigerator Cars
H. Schreiber, Assistant to Chairman—Statistics
R. S. Harlan, Assistant—Advisory Boards
J. J. Kelley, Director of Military Transportation
A. E. Highland, Manager, Railroad Relations
J. H. Blose, Manager, Closed Car Section
T. W. Flickinger, Manager, Open Car Section
H. G. Randall, Manager, Port Traffic

October 5, 1965
File: 522-947

Supplement No. 11
to
Circular CSD 500

To All Railroads:

Herewith Second Revised Service Order No. 947, Railroad Operating Regulations for Freight Car Movement, effective at 12:00 Noon, October 1, 1965, (received in this office at 4 p.m., Monday, October 4), and expiring at 11:59 p.m., December 31, 1965.

The only change in this Second Revision compared with Revised Service Order 947 distributed with our letter April 29, 1965 covering Supplement No. 9 to Circular CSD 500 appears in paragraph (5) (ii) naming R. D. Pfahler, Director, and H. R. Longhurst, Assistant Director, Bureau of Railroad Safety and Service, ICC, as Agents of the Commission.

Yours very truly,

/s/ E. P. Miller

Lists: CS-1, 1A, 1B, DMs, CSAs.

Title 49 — Transportation
Chapter I — Interstate Commerce Commission
Subchapter A — General Rules and Regulations

Part 95 — Car Service

Service Date
October 4, 1965

Second Revised Service Order No. 947

Railroad Operating Regulations for Freight Car Movement

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 1st day of October, A.D., 1965.

It appearing, That an acute shortage of freight cars exists in all sections of the country; that cars loaded and empty are unduly delayed in terminals and in placement at, or removal from industries; that present rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of freight cars are insufficient to promote the most efficient utilization of cars; it is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are imprac-

ticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§95.947 Railroad Operating Regulations for Freight Car Movement.

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce and obey the following rules, regulations and practices with respect to its car service:

(1) Placing of Cars:

(i) Loaded cars, which after placement will be governed by demurrage rules applicable to detention of cars awaiting unloading, shall be actually or constructively placed within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following arrival at destination.

(ii) Actual placement means placing of car on consignee's tracks, or when for public delivery placement on carrier's tracks accompanied by proper notice.

(iii) When delivery of a car, either empty or loaded consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of any condition attributable to the consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at an available hold point and constructive placement, notice shall be sent or given the consignee in writing within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival of car at hold point.

(iv) Loaded cars held at billed destination for accessorial terminal services described in the applicable tariffs, such as holding for orders or inspection, shall be placed on carrier's or consignee's unloading or inspection tracks, within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival at billed destination. On cars set off and held short of billed destination, a written notice shall be sent or given to consignee within 24 hours following the first 7:00 a.m. after arrival at hold point.

(2) Removal of Cars:

(i) Empty cars must be removed from point of unloading or interchange tracks of industrial plants within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following unloading or release by consignee or shipper, unless such cars unloaded are ordered or appropriated by the shipper for reloading within such a 24-hour period. Empty cars not required for loading at point where made empty must be forwarded in line-haul service within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following removal of empty cars.

(ii) Outbound loaded freight cars must be removed from point of loading or interchange tracks of industrial plants within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following tender and acceptance by carrier of the bill of lading covering the cars. Such cars must be forwarded in line-haul service within 24 hours after the first 7:00 a.m. following their receipt in outbound makeup or classification yards.

(3) Holding Cars for Prospective Loading:

(i) Cars shall not be held for prospective loading at any time, for any industry, or consignor, other than those needed to protect current outbound loading.

(4) Repair Tracks:

(i) Any cars taken out of service for repairs, or carded for repairs, shall be repaired at the earliest time consistent with efficient railroad operating practices.

(5) Car Distribution Orders:

(i) Observe, obey and comply with special car orders and freight car distribution orders now outstanding, or hereafter issued by the Car Service Division, Association of American Railroads, not inconsistent with any order of the Commission. E. Paul Miller, Chairman of the Car Service Division, is directed to inform the Director or the Assistant Director of the Bureau of Railroad Safety and Service of such outstanding orders or similar orders which may be subsequently issued and, to advise the Director or the Assistant Director of the Bureau of Railroad Safety and Service of railroad performance and compliance with such orders.

(ii) R. D. Pfahler, Director, and H. R. Longhurst, Assistant Director, Bureau of Railroad Safety and Service, Interstate Commerce Commission, and each of them, are hereby appointed Agents of the Commission with authority to issue such orders or directions as either may find necessary with respect to the location, relocation, and distribution of freight cars as between sections of the country, or carriers by railroads or on such carriers, throughout the United States.

(6) Yard Checks, Supervision and Records:

(i) The necessary yard and track checks shall be made and sufficient supervision and records shall be maintained to enable carriers to comply with the provisions of this order.

(7) Railroad Operating Regulations for the Movement of Loaded Freight Cars:

(i) No common carrier by railroad subject to the Interstate Commerce Act shall willfully delay the movement of loaded freight cars by holding such cars in yards, terminals, or sidings for the purpose of increasing the time in transit of such loaded cars.

(ii) Loaded cars shall not be set out between terminals except in cases of emergencies or sound operating requirements.

(iii) Backhauling loaded cars for the purpose of increasing the time in transit shall constitute willful delay and is prohibited.

(iv) Through loaded cars shall not be handled on local or way freight trains for the purpose of increasing the time in transit of such loaded cars.

(v) The use by any common carrier by railroad, for the movement of loaded freight cars over its line, of any route other than its usual and customary fast freight route from point of receipt of the car from consignor or connecting line, except in emergencies, or for the purpose of according a lawfully established transit privilege (not including a diversion or reconsignment privilege) is hereby prohibited.

(8) Carrier Officials' Responsibility:

(i) The division superintendent in charge of each terminal under his jurisdiction or supervision, or if no division superintendent is in charge the general manager of each railroad will be held responsible for car service at each terminal and for the proper observance of the rules prescribed by this order.

(b) Application.

(1) The provisions of this order shall apply to intrastate and interstate commerce.

(2) When computing the periods of time provided in this order, exclude Saturdays, Sundays, and such holidays as are listed in Item No. 25, Agent H. R. Hinsch's Demurrage Tariff I.C.C. H-11, or reissues thereof, only when they occur within the said periods of time, but not after.

(c) Regulations Suspended — Announcement Required.

The operation of all rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20, announcing such suspension.

(d) Effective date. This order shall become effective at 12:00 Noon, October 1, 1965.

(e) Expiration date. This order shall expire at 11:59 p.m., December 31, 1965, unless otherwise modified, changed, or suspended by order of this Commission.

(Sec. 1, 12, 15, 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15. Interprets or applies Sec. 1(10-17), 15(4), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of all the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at

Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

H. Neil Garson,
Secretary

(SEAL)

APPENDIX D

ASSOCIATION OF AMERICAN RAILROADS
Operations and Maintenance Department
Car Service Division
Transportation Building
Washington, D. C. 20006

R. R. Manion
Vice President
Operations and Maintenance Dept.

E. P. Miller, Chairman
B. W. Taylor, Executive Assistant
D. W. Benton, Assistant to Chairman—Refrigerator Cars
H. Schreiber, Assistant to Chairman—Statistics
R. S. Harlan, Assistant—Advisory Boards
J. J. Kelley, Director of Military Transportation
A. E. Highland, Manager, Railroad Relations
J. H. Blose, Manager, Closed Car Section
T. W. Flickinger, Manager, Open Car Section
H. G. Randall, Manager, Port Traffic

October 1, 1965

Circular CSD No. 510

To All Railroads:

Herewith copy of Interstate Commerce Commission Service Order No. 968 issued by the Commission October 1, 1965, effective at 12:01 A.M., October 4, covering utilization of fifty foot long or longer plain box cars (XM, XME and XI), and plain box cars forty foot long or longer with side door openings eight foot wide or wider (XM, XME and XI).

The order is scheduled to expire at 11:59 P.M., Decem-

ber 31, 1965, unless otherwise modified, changed, suspended or annulled by order of the Commission.

Yours very truly,

/s/ E. P. Miller

Lists: CS-1, 1A, 1B, DMs, CSAs.

Title 49 — Transportation
Chapter I — Interstate Commerce Commission
Subchapter A — General Rules and Regulations
Part 95 — Car Service

Service Date
October 1, 1965

Service Order No. 968

Utilization Of Fifty-Foot Long Or Longer Plain Boxcars And Plain Boxcars Forty-Foot Long Or Longer With Side Door Openings Eight-Foot Wide Or Wider

At a Session of the Interstate Commerce Commission, Railroad Safety and Service Board, held in Washington, D.C., on the 1st day of October, A.D. 1965.

It appearing, That there is an acute shortage of boxcars fifty-foot long or longer and boxcars forty-foot long or longer with side door openings eight-foot wide or more; and it appearing that the present carrier rules, regulations and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of boxcars of these dimensions to the railroads owning such cars are ineffective; the Commission is of the opinion that an emergency exists requiring immediate action in all parts of the country, and that notice and public procedure are impracticable and contrary to the public interest and that good cause exists for making this order effective less than thirty-days' notice.

It is ordered, That:

§ 95.968 Utilization Of Fifty-Foot Long Or Longer Plain Boxcars And Plain Boxcars Forty-Foot Long Or Longer With Side Door Openings Eight-Foot Wide Or Wider.

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) The provisions of this order apply to plain (XM, XME, and XI) forty-foot or longer boxcars with side door openings of eight-foot or wider and plain (XM, XME, and XI) fifty-foot or longer boxcars with any size side door opening of all ownerships, including all boxcars with plug doors.

(2) For purposes of this order, districts as shown in the Official Railway Equipment Register, ICC R.E.R.-No. 356, supplements thereto or subsequent reissues thereof govern. These districts are identified as Association of American Railroads car selection chart showing home districts for all principal freight car ownership.

(3) Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner.

(4) Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner.

(5) Cars located in other districts (not home districts or districts adjacent thereto) may be used for loading to, via, or in the direction of the owner, or to any destination within a home district or within a district adjacent or intermediate to a home district.

(6) Cars locating empty at a junction with the owner must be loaded to or via the owning road or delivered owner empty at that junction.

(7) In the absence of proper loading, cars must be moved to the owner empty under Association of American Railroads Car Service Rules or Special Car Order 90.

(8) The provisions of this order do not relieve carriers of the necessity to comply with the time limitations applicable to the movement of cars under Second Revised Service Order No. 947.

(9) R. D. Pfahler, Director, and H. R. Longhurst, Assistant Director, Bureau of Railroad Safety and Service, Interstate Commerce Commission, and each of them, are hereby appointed Agents of the Commission with authority to grant permits of exemption from this order as they may find necessary.

(b) Application. The provisions of this order shall apply to intrastate and interstate commerce.

(c) Effective date. This order shall become effective at 12:01 A.M., October 4, 1965.

(d) Expiration date. This order shall expire at 11:59 P.M., December 31, 1965, unless otherwise modified, changed, suspended, or annulled by order of this Commission.

(Sec. 1, 12, 15, 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15. Interprets or applies Sec. 1 (10-17), 15(4), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4).)

It is further ordered, That copies of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the rail-

roads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order shall be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Safety and Service Board.

H. Neil Garson
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE — RAILROAD FREIGHT CAR SUPPLY

For Legislative History of Act, see p. 1563

Public Law 89-430; 80 Stat. 168

[S. 1098]

An Act to amend section 1(14)(a) of the Interstate Commerce Act to insure the adequacy of the national railroad freight car supply, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 1(14) (a) of the Interstate Commerce Act[9] is amended by adding at the end thereof the following: "In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition

9. 49 U.S.C.A. §1(14).

and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

Sec. 2. Any compensation fixed pursuant to the amendment made to the Interstate Commerce Act by the first section of this Act shall not take effect before September 1, 1966.

Approved May 26, 1966.

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SUPREME COURT, U. S.

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FILED
OCT 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 534

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Respondent*.

To the United States Court of Appeals for The Seventh Circuit.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION FOR WRIT OF CERTIORARI

LESLIE N. JONES
Box 98
Flora, Illinois

F. S. FEIGER
Box 279
Fairfield, Illinois

JOHN C. ROBISON
Box 279
Fairfield, Illinois

GERALD T. QUINDRY
Box 279
Fairfield, Illinois

PRESS PRINT--FAIRFIELD, ILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 534

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Respondent*.

To the United States Court of Appeals for The Seventh Circuit.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION FOR WRIT OF CERTIORARI

This case does not involve any question of the rationing of existing cars nor any discrimination resulting from that rationing. We do not doubt we get our fair share of the *existing* facilities of Respondent; we only point out that the *existing* facilities are inadequate. There was presented below and we are presenting here one single question: If the facilities of a carrier is in-

adequate to serve normal transportation requirements, have the damaged shippers any remedy?

As we stated in our petition, the case arises from a long standing, continuous and serious car shortage, which is normal to the territory served by Respondent and is not the product of a temporary emergency or some vagrant seasonal demand. This shortage has its origin in the failure of Respondent to replace or repair worn out cars; consequently the amount of facilities, particularly box cars suitable for grain, is constantly decreasing. Petitioner urges the matter is within the jurisdiction of the Federal Courts whereas Respondent, in effect, alleges there is no remedy.

Respondent in its brief in opposition to the granting of the writ here prayed, primarily argues two legal conclusions:

(1) The case of *United States vs. Pennsylvania Railroad Company*, 242, U. S., 208, holds that the Interstate Commerce Commission has no authority to require a carrier to acquire the facilities necessary to discharge its normal duties to furnish reasonable transportation service, but

(2) Notwithstanding this lack of authority of the Commission any action with respect to the situation must be brought before the Commission and not before the Federal Courts.

This, of course, is in effect an argument that there is no way to compel a carrier to discharge its clear legal duty to furnish adequate transportation.

We agree with Respondent that the Interstate Commerce

Commission has no authority to compel the carrier to maintain adequate facilities. We do not agree, however, that the Federal Courts are equally impotent. We urge that the case of *United States vs. Pennsylvania Railroad Co.*, supra, expressly recognizes the power inherent in the Courts to compel the furnishing of adequate service, even if it is necessary for the carrier to acquire facilities to do so.

Respondent further argues that the Commission has primary jurisdiction over the rationing of *existing* cars and facilities and the curing of any discrimination which might result from that rationing. Here again we agree. Respondent sets forth at great length what has been done both by the carriers and by the Commission with respect to the marshalling and handling of the *existing* cars. This, however, is not the case presented. We are not complaining about the rationing or handling of *existing* cars, but, recognizing that the total number of *existing* cars is insufficient to serve the normal transportation requirements of the territory, we urge that the Courts compel the carrier to furnish reasonable service even if it is necessary for it to acquire additional facilities to do so.

If the facilities of a carrier have worn out to the extent that it is no longer possible to supply reasonable service under normal conditions of transportation, there must be some remedy for the public. Since both petitioner and Respondent agree that the Commission has no such authority, we think it is clear that the Courts, of necessity, have it. Furthermore, we think it is

quite clear that the case of *United States vs. Pennsylvania Railroad Co.*, supra, reaches this specific conclusion.

Ultimately, Respondent's argument means that so long as there is one car in the possession of the Respondent railroad, the Interstate Commerce Commission may specify what should be done with that one car and thus defeat the jurisdiction of the Courts. We submit such a situation is intolerable. We recognize, of course, that during the peak of grain movement there must be some delay but don't concede that a carrier can let it's equipment deteriorate and worsen over a period of time to the point of failure, such as is apparent in this case.

Respectfully submitted.

LESLIE N. JONES
Box 98
Flora, Illinois

F. S. FEIGER
Box 279
Fairfield, Illinois

JOHN C. ROBISON
Box 279
Fairfield, Illinois

GERALD T. QUINDRY
Box 279
Fairfield, Illinois